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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION,

Petitioner,

v.

THE UNITED STATES, BROTHER INDUSTRIES, LTD., BROTHER INTERNATIONAL CORPORATION, SILVER SEIKO, LTD., and SILVER REED AMERICA, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENTS BROTHER INDUSTRIES, LTD., AND BROTHER INTERNATIONAL CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the antidumping statute authorizes those provisions of the implementing regulations governing the calculation of antidumping duties which provide (a) for the deduction from "foreign market value" of selling expenses actually incurred by the foreign manufacturer in its home market sales up to the amount deducted from "United States price" for selling expenses incurred in its sales in the United States market (the "exporter's sales price offset"), and (b) for the adminstrator to be guided primarily by a foreign seller's cost in quantifying adjustments to be made for differences in circumstances of sales in the home market and in the United States market.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 713 F.2d 1568 and is set out as Appendix A to the petition (Pet. 1a-27a).[1] The

[1] References to the Transcript of Record in the court below, which has been filed in this Court, are designated "R. ____;" references to the petition are designated "Pet. ____."

opinion of the United States Court of International Trade (Pet. 28a-72a) is reported at 540 F. Supp. 1341.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1983. The petition for a writ of certiorari was filed on November 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, are set forth in Appendix C to the petition (Pet. 73a-80a) and also, together with section 3(b) of the Trade Agreements Act of 1979, in Appendix A to this brief at pages 1a-5a. The relevant portions of the regulations issued by the Secretary of Commerce are set forth in Appendix D to the petition (Pet. 81a-82a) and Appendix B to this brief at pages 6a-7a.

STATEMENT OF THE CASE

Petitioner, the Smith-Corona Group of SCM Corporation, a domestic manufacturer of portable electric typewriters (PETs), seeks to overturn an "Early Determination of Antidumping Duties" issued by the Department of Commerce.[2] The determination required the respondents, Brother Industries, Ltd., and Brother International Corp. (collectively Brother)[3], manufacturers and

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[2] 45 Fed. Reg. 53,853 (1980); Pet. 86a-96a.

[3] Brother Industries, Ltd., is a Japanese corporation and is not a subsidiary or affiliate of any other organization. Brother International Corporation is incorporated in the State of Delaware and is a wholly-owned subsidiary of Brother Industries, Ltd.

importers, respectively, of Japanese PETs, and Silver Seiko, Ltd., and Silver Reed America, Inc. (collectively Silver), to deposit estimated antidumping duties pending liquidation of entries. Petitioner challenges various price adjustments granted by the Commerce Department, pursuant to its regulations, which petitioner claims improperly reduced the amount of the estimated antidumping duties.

1. *The statute.* The current antidumping law[4] (the Act), enacted by the Trade Agreements Act of 1979[5] as an amendment to the Tariff Act of 1930, replaced the Antidumping Act, 1921.[6] The purpose of the law is to prevent and protect against dumping, generally defined as the sale of a product in an export market at a price lower than that charged in the domestic market. The statute provides for the imposition of a special antidumping duty if foreign merchandise is found to be sold in the United States at less than its "fair value," to the material injury of a United States industry.[7] The amount of the duty is equal to the "dumping margin," that is, the amount by which the "foreign market value" (essentially the same as the "fair value") exceeds the "United States price" for the merchandise.[8] The purpose of the duty is not to impose a penalty but to equalize competitive conditions between foreign exporters and affected domestic

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[4] 19 U.S.C. §§ 1673 *et seq.* (Supp. V 1981).

[5] Pub. L. No. 96-39, 19 U.S.C. §§ 2502 *et seq.*, 93 Stat. 144 (1979).

[6] Pub. L. No. 67-10, 42 Stat. 11, as amended.

[7] Section 731, 19 U.S.C. § 1673. Section references are to the Tariff Act of 1930, as amended.

[8] *Id.*; 19 C.F.R. § 353.1.

industries.[9] The law is so structured as to encourage foreign producers to avoid the duty by selling their merchandise in the United States at prices which are not lower than the prices at which they sell their goods in the home market.

Like its predecessor, the present antidumping law provides for a two-step process: First, an antidumping investigation which may lead to the issuance of an antidumping duty order applicable to all imports of the merchandise in question; and second, the calculation of antidumping duties, and their eventual assessment against the importer, on individual entries of the merchandise. The investigation is initiated by the Department of Commerce[10] and the International Trade Commission either on the Commerce Department's own initiative or by petition of an "interested party."[11] The Commerce Department determines whether the foreign merchandise is being sold in the United States below its fair value, while the Commission determines whether any

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[9] *C.J. Tower & Sons* v. *United States*, 71 F. 2d 438, 445 (C.C.P.A. 1934). Speaking of the Antidumping Act, 1921, the court said: "Great care is provided to have such equalization do complete justice, as is seen by a consideration" of the provisions regarding notice and the methods of calculating foreign market value, purchase price, etc. *Id.* at 443.

[10] The Secretary of Commerce was named as the "administering authority" (the term used in the Act) of the antidumping law, in place of the Treasury Department, by Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979), pursuant to § 771(1), 19 U.S.C. § 1677(1).

[11] Section 732, 19 U.S.C. § 1673a. "Interested party" is defined to include a United States manufacturer of a like product, as well as a foreign manufacturer or exporter or the United States importer of the merchandise. Section 771(9), 19 U.S.C. § 1677(9).

such imports are causing, or threatening to cause, material injury to a United States industry.[12] Once a petitioner, such as the Smith-Corona Group, files a petition accompanied by supporting information reasonably available to it,[13] the Commerce Department proceeds to conduct its less-than-fair-value investigation, principally by means of questionnaires it prepares and submits to foreign manufacturers and exporters and any of their related United States importers, followed by field verification of the responses and other information generated during the investigation.[14]

As an "interested party," a domestic manufacturer is entitled to have access to non-confidential and (subject to protective order) confidential information obtained by Commerce[15] and to participate in any hearing. The Act, while requiring published notice of a hearing and a hearing transcript, expressly exempts hearings from the provisions of the Administrative Procedure Act[16] which provide evidentiary, burden-of-proof, and other rules for hearings relating to administrative rule-making and adjudications, but not investigations such as those involved in antidumping proceedings.[17]

Meanwhile, the Commission is similarly conducting its own injury investigation. In accordance with strict timetables added by the Act, within 45 days and 160 days, respectively, after the filing of the petition or the opening

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[12] Section 731, 19 U.S.C. § 1673.

[13] Section 732(b)(1), 19 U.S.C. § 1673a(b)(1).

[14] Section 776, 19 U.S.C. § 1677e.

[15] Section 777, 19 U.S.C. § 1677f.

[16] 5 U.S.C. §§ 551-559.

[17] Section 774, 19 U.S.C. § 1677c.

of the Commerce Department investigation, preliminary determinations must be made by the Commission regarding injury, and the Commerce Department regarding less-than-fair-value sales, in each case based upon the best information then available to the agency.[18] Within 75 days (unless extended) after issuance of an affirmative Commerce Department preliminary determination, which must include estimated average dumping margins,[19] the Commerce Department must make its final determination of whether the merchandise is being sold in the United States at less than fair value.[20] The Commission's final determination regarding injury normally must be made within 45 days after that of Commerce.[21]

If both final determinations are affirmative, Commerce publishes an antidumping duty order requiring the deposit of estimated antidumping duties pending liquidation of entries of merchandise and directing Customs officers to assess, within six months after Commerce receives satisfactory information on which to base the assessment, an antidumping duty equal to the amount by which the foreign market value of the particular merchandise entered exceeds its United States price.[22] This ends the first stage of the proceedings.

The second stage consists of the actual assessment of dumping duties. The Act provides for an "early determination of duty"[23], such as is here at issue. This

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[18] Section 733, 19 U.S.C. § 1673b.

[19] Section 733(b)(1), 19 U.S.C. § 1673b(b)(1).

[20] Section 735(a), 19 U.S.C. § 1673d(a).

[21] Section 735(b)(2), 19 U.S.C. § 1673d(b)(2).

[22] Sections 735(c)(2) and 736(a), 19 U.S.C. §§ 1673d(c)(2) and 1673e(a).

[23] Section 736(c), 19 U.S.C. § 1673e(c).

affords foreign manufacturers, whose merchandise has been found to be dumped based upon comparison of the foreign market value and United States price of sales made during the period covered by the investigation, an opportunity for a special review of their current pricing structure and to have new dumping margins determined from this more current data. The Act prescribes the period to be used in this review as sales of merchandise imported from the date of the affirmative preliminary determination by Commerce to publication of the Commission's final injury determination.[24]

Since the purpose of determining the foreign market value of the merchandise is to compare it with the United States price, "foreign market value" is defined, as here pertinent, as the price at which such or similar merchandise is sold for home consumption, increased by the amount of all packing "costs, charges, and expenses" to the foreign manufacturer or exporter, including containers and coverings, incident to placing the merchandise in condition for shipment to the United States.[25] "United States price" means either "purchase price"—the price at which merchandise is purchased from the manufacturer for exportation to the United States—or, as here applies, "exporter's sales price"—the price at which merchandise is sold in the United States "by or for the account of the exporter"[26], with "exporter" being defined as including the United States importer if, as here, the importer is related to the exporter or manufacturer.[27]

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[24] *Id.; see also* S. Rep. No. 249, 96th Cong., 1st Sess. 76 (1979), *reprinted in* [1979]2 *U.S. Code Cong. & Ad. News* 381.

[25] Section 773, 19 U.S.C. § 1677b.

[26] Section 772(a), (b) and (c), 19 U.S.C. § 1677a(a), (b) and (c).

[27] Section 771(13), 19 U.S.C. § 1677(13).

Both purchase price and exporter's sales price are subject to statutory adjustments for specified direct costs, some increasing and others reducing the price.[28] If exporter's sales price applies, it is to be further reduced by the amount of any sales commissions in the United States, "expenses generally incurred by or for the account of the exporter [and, by definition, a related importer] in the United States in selling" such merchandise, and any increased value resulting from any post-importation manufacture or assembly.[29] Since the dumping margin is the amount by which the adjusted foreign market value exceeds the adjusted (in this case) exporter's sales price, the adjustment which adds packing costs to foreign market value increases the dumping margin, as do the deductions from exporter's sales price, while the additions to exporter's sales price decrease the dumping margin.

In addition to these mandatory adjustments, the Act provides that, "if it is established to the satisfaction of" the Secretary of Commerce that the amount of any difference, or lack of it, between the United States price and the foreign market value is wholly or partly due to differences in quantities or physical characteristics between the merchandise sold in the two markets, or "other differ-

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[28] These prices are to be increased by packing costs not included in the price; any import duties and (if applicable to domestically-sold merchandise) direct taxes imposed by the country of exportation which, because of the exportation, are rebated or not collected; and certain United States countervailing duties imposed. They are to be reduced by the amount (if included in the price) of "any additional costs, charges, and expenses" and most United States import duties incident to shipment to the United States; and certain export taxes, duties or other charges imposed by the exporting country. Section 772(d)(1) and (2), 19 U.S.C. § 1677a(d)(1) and (2).

[29] Section 772(e), 19 U.S.C. § 1677a(e).

ences in circumstances of sale . . . then due allowance shall be made therefor" in determining foreign market value.[30] Depending upon the circumstances, adjustments based on such differences may be either added to or subtracted from foreign market value, thereby increasing, decreasing or eliminating any dumping margin which would otherwise be found.[31]

The purpose of these numerous adjustments is to arrive at a fair and equitable comparison, at the same level of trade, between the price of goods sold for export to the United States and those sold in the domestic market.[32]

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[30] Section 773(a)(4), 19 USC 1677b(a)(4).

[31] The Act also allows the Secretary, in certain circumstances, to use sampling techniques and to disregard insignificant adjustments in calculating foreign market value. Section 773(f), 19 U.S.C. § 1677b(f). According to the Senate Report, the purpose is to prevent "delays which are unwarranted and not required by reasonable fairness. It takes into account the administrative burden of assessing antidumping duties on an entry-by-entry basis within the time limits imposed under the bill." *Op. cit. supra.*, note 24, at 96.

[32] When the provision for adjustments based on "other differences in circumstances of sale" was first enacted, the House Committee said of it: "This is designed to facilitate efficient and fair comparison between foreign market value and price to the United States market." H. Rep. No. 1261, 85th Cong., 1st Sess. 7 (1957). Contrary to petitioner's undocumented assertions (Pet. 4), tentatively accepted by the court below (Pet. 51), the level of trade at which the comparison is to be made is essentially ex factory, not "f.o.b. foreign port." *See* Department of Treasury, "Antidumping Duties," in *United States International Economic Policy in an Interdependent World, I Papers* 395 (1971), cited in B. Clubb and P. B. Feller, "The Antidumping Law of the United States," in *A Lawyer's Guide to International Business Transactions, Part I* 93, n.26 (2nd ed. 1977). Logic compels this result, since goods sold in the domestic market are not sold "f.o.b. foreign port."

The authority granted by the Trade Agreements Act of 1979 to issue regulations implementing its provisions was highly unusual due to that act's nature and antecedents. The statute was enacted in accordance with the requirements of the Trade Act of 1974,[33] which had granted the President authority to enter into trade agreements[34] to be implemented by legislation drafted by the President, submitted to Congress together with "a statement of any administrative action proposed to implement such agreement[s], and an explanation as to how the implementing bill and proposed administrative act can change or affect existing law",[35] and passed without amendment under expedited procedures.[36] In 1979, after consultation with Congress, the President submitted a draft bill and the required "Statements of Administrative Action."[37] Accordingly, the resulting statute provides that "[r]egulations necessary or appropriate to carry out actions proposed in any statement of proposed administrative action . . . shall be issued."[38]

2. *The regulations.* The pertinent regulations are those relating to differences in circumstances of sale found in 19 C.F.R. § 353.15 (*infra*, pages 6a-7a).[39] In accordance with the Statements of Adminstrative Ac-

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[33] Pub. L. No. 93-618, 93rd Cong., 88 Stat. 1978 *et seq.*, January 3, 1975, 19 U.S.C. § 2102 *et seq.*

[34] 19 U.S.C. § 2111.

[35] 19 U.S.C. § 2112(d).

[36] 19 U.S.C. § 2191.

[37] *Trade Agreements Act of 1979—Statements of Administrative Action*, H. Doc. No. 96-153, Part II, 96th Cong., 1st Sess. (1979).

[38] 19 U.S.C. § 2504(b), printed *infra* at pages 4a, 5a.

[39] As printed at Pet. 81a-82a, this regulation contains italicized emphasis not found in the original.

tion, the new regulation is substantially identical to its predecessor.[40] As here pertinent, the regulation provides that reasonable allowances for bona fide differences in circumstances of sales will be made "to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences," and that, "in general," such allowances will be limited to differences in circumstances bearing a direct relationship to the sales under consideration.[41] The "Special Rule" providing for the "exporter's sales price offset" (ESP offset) states:

> In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.[42]

For purposes of determining the amount of allowances for differences in circumstances of sale, the regulation provides that the "Secretary will be guided primarily by the *cost* of such differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise"[43] (emphasis added).

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[40] 19 C.F.R. § 153.10 (1980). The Statements of Administrative Action stated that "[r]egulations affecting the use of existing terms, such as those relating to adjustments, will generally remain in effect," and, regarding "foreign market value," that "[b]y regulation, the Authority will establish groups of adjustments based on those currently recognized, namely, those based on differences in . . . the circumstances of . . . sale." *Op. cit. supra* in note 37, at 410, 411.

[41] 19 C.F.R. § 353.15(a).

[42] 19 C.F.R. § 353.15(c).

[43] 19 C.F.R. § 353.15(d).

3. *Administrative proceedings.* The antidumping investigation resulting in the Antidumping Duty Order on PETs from Japan, published May 9, 1980[44], was opened by the Treasury Department in May 1979 following the filing of a petition by the Smith-Corona Group, petitioner here.[45] The investigation covered PETs sold to the United States and in the Japanese home market from November 1, 1978 through April 30, 1979.[46] The March 21, 1980 final determination of the Commerce Department found margins, after various adjustments to the foreign market value, purchase price and exporter's sales price, of 48.70 percent *ad valorem* for sales by Brother during the year-earlier period under investigation.

Both Brother and Silver took advantage of the "early determination" provisions of the statute.[47] An examination of Brother's sales during the statutorily-mandated period from January 4 to May 7, 1980, in which Commerce applied the same types of adjustments as it had in its March 21 final determination, resulted in a determination of dumping margins of 4.33 percent on Brother's sales.[48] It is this Early Determination of Antidumping Duties which petitioner challenged in the courts below.

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[44] 45 Fed. Reg. 30,618; Pet. 83a-85a.

[45] 44 Fed. Reg. 29,191.

[46] 45 Fed. Reg. 1,221, (1980).

[47] Section 736(c), 19 U.S.C. § 1673e(c).

[48] 45 Fed. Reg. 53,855 (1980); 46 Fed. Reg. 14,007 (1981). The difference between the margins of 48.70 and 4.33 percent for the investigatory and "early determination" periods, respectively, is explained by two factors: First, a drastic fall in the official Japanese yen rate of exchange from 177 yen to the dollar in November 1978 (T.D. 78-382, 12 Cust. Bull. 817) to 254 yen to the dollar in April 1980 (T.D. 80-103, 14 Cust. Bull. 207); and second, price changes by Brother (*see* 45 Fed. Reg. 53,854) to reduce or eliminate dumping margins, which the Act is designed to bring about.

4. *Proceedings below.* Petitioner's action filed in the United States Customs Court, now the United States Court of International Trade (CIT), which has exclusive jurisdiction of such actions,[49] attacked two provisions of the regulations, those providing for the ESP offset[50] and for primary reliance on cost to the seller in making reasonable allowances for differences in circumstances of sale (the Cost Rule),[51] claiming each is inconsistent with and in violation of the Act (Pet. 33a).[52]

The Court of International Trade, per Newman, J., affirmed the Early Determination of Antidumping Duties in all respects. The court concluded that both challenged regulations "are reasonable, effectuate the Congressional scheme, and were properly applied by Commerce" (Pet. 70a), are in conformity with the entire statutory scheme and the authority granted by Congress, are valid exercises of the discretion granted by the Act, are not precluded by the legislative history, and are supported by long-existing administrative practice.

Regarding the ESP offset, the court held:

> The calculation of dumping margins would be severely distorted if no offsetting adjustments were permitted in the calculation of foreign market value . . . [U]nfairness is eliminated, in part, by the ESP offset

[49] 19 U.S.C. § 1516a.

[50] 19 C.F.R. § 353.15(c).

[51] 19 C.F.R. § 353.15(d).

[52] Petitioner also claimed the amounts of specific adjustments granted by Commerce were not in accordance with the statute and regulations and were unsupported by substantial evidence. Although both courts below ruled adversely to petitioner on these issues, Pet. 21a-27a, 55a-70a, they are not raised in the petition and thus are abandoned.

> since it prevents the imposition of antidumping duties solely as a result of the selling expenses incurred by the manufacturer in the home market. Since . . . the circumstances of sale provision was intended by Congress to facilitate fair comparison between foreign market value and price to the United States market, and since the ESP offset is designed to effectuate that intent, SCM's argument that the ESP offset violates Congressional intent is completely without merit. [Pet. 53a]

Judge Newman similarly found the Cost Rule to be "well within the discretion granted by the statute" (Pet. 37a), grounded on the logic "that under normal market conditions prices directly reflect costs" (Pet. 38a), and in most instances reference to cost is probably the only practical and efficient method of calculating differences in circumstances of sale within the time limits imposed by the Act (Pet. 44a, 45a). The alternative, adjustments based on the market value of various differences in circumstances of sale, would, he held, be virtually impossible to administer, requiring as it would "a highly complex quantification process involving a multitude of economic factors *including a cost analysis*" (Pet. 45a; emphasis in the original).

The Court of Appeals for the Federal Circuit affirmed, finding the two challenged regulations a proper and reasonable exercise of the Secretary's authority, particularly in view of the statute's "tremendous deference to the expertise of the Secretary of Commerce in administering the antidumping law" (Pet. 27a). With several exceptions not relevant to its holdings, the court found itself in agreement with Judge Newman's handling of "all issues"[53] in the case as expressed in his "thoughtful and

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[53] The court below differed with the CIT only in concluding that, regarding both the ESP offset and Cost Rule, the legislative history

comprehensive" and "well-reasoned opinion" (Pet. 12a, 16a).[54] Applying the usual tests to determine the validity of regulations, the court agreed that the statutory language and the general Congressional purpose of achieving a fair, equitable and efficient comparison are sufficient to validate the regulations.[55]

ARGUMENT

Petitioner seeks to raise for the first time in this Court two issues—the constitutionality of the statute and the validity of the "Cost Rule" as measured against a supposed rule of law regarding "irrebuttable presumptions"—which were not raised in either court below,[56] were not decided by them, are thus not available for review by this Court, and cannot properly be raised on petition for a writ of certiorari. Moreover, petitioner's real complaint appears to be that the opinion of the court

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was ambiguous and the administrative interpretation was insufficiently long standing to warrant special deference.

[54] In *Carlisle Tire and Rubber Co.* v. *United States*, 3 CIT ____, Slip Op. 82-37 (May 12, 1982), Judge Maletz of the CIT agreed with the "comprehensive and well-reasoned opinion by Judge Newman" in the case at bar and concluded that it was controlling on the issues presented in *Carlisle*.

[55] We invite the Court's attention to a typographical error in the printing of a sentence in the opinion of the court below in Appendix A to the Petition, at Pet. 13a-14a. The sentence there reads: "Additionally, the statute does not vest broad discretion in the Secretary." As reported it reads: "Additionally, the statute does vest broad discretion in the Sectretary." 713 F.2d 1568, 1576.

[56] The Statement of the Issues set forth in petitioner's Brief for Appellant, at pages 1 and 2, in the court below is reprinted as Appendix B to this brief at page 8a. The issues presented by petitioner to the CIT appear at R. 430-433.

below suffers from internal inconsistencies which, if they in fact exist, should be disposed of by a rehearing, not by this Court.

In any case, two courts vested with specialized and exclusive jurisdiction in customs matters, including the interpretation and application of the antidumping law—the Court of International Trade and the Court of Appeals for the Federal Circuit—have upheld the action of the Secretary of Commerce in issuing the antidumping regulations challenged by petitioner, agreeing on the answers to the questions of statutory interpretation presented to them. Their decisions are clearly correct. Moreover, any other holding would create unfairness and confusion in the administration of the antidumping law. There is neither an actual nor potential conflict with the views of any other circuit, in view of the exclusive subject-matter jurisdiction of the courts below.[57] The petition should be denied.

1. The petition seeks to present to this Court the question of whether the court below committed error "as a matter of federal statutory law and as matter of constitutional separation of powers principles" (Pet. i). The body of the petition, and particularly the two headings of petitioner's substantive arguments,[58] indicate that peti-

[57] 19 U.S.C. § 1516a; 28 U.S.C. § 2645(c).

[58] Omitting capitalization, the first heading states that "the rationale adopted by the Court of Appeals would render the statute an unconstitutional delegation of legislative authority and violates the constitutional requirement of separation of powers;" the second states that "the decision below conflicts with the decisions of this Court," and cites (in subheading A) *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81 (1961). The argument under the first heading deals with the ESP offset; that under the second deals with the Cost Rule.

tioner asks this Court to decide (a) whether, in light of the ESP offset rule, the Act unlawfully delegates legislative authority,[59] and (b) whether the Cost Rule creates an unlawful irrebuttable presumption, is unreasonable, and is therefore an improper exercise of the Secretary's rulemaking authority.

By thus framing the issues, petitioner attempts to raise two issues, one constitutional and one legal, never presented to the courts below for decision.[60] Although the Court of Appeals for the Federal Circuit did no more than affirm the CIT's validation of the Secretary's regulations, petitioner's presentation implies that the appellate court's opinion for the first time created the constitutional and "irrebuttable presumption" issues the petition poses. Plainly, however, this is not the case. If these issues are

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[59] Petitioner principally relies on the 1935 decision in *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495, and *National Cable Television* v. *United States*, 415 U.S 336, 342 (1974). Commenting that the Court's purpose in discussing delegation in *National Cable Television* "was merely to justify a narrow interpretation of a statute," Professor Kenneth Culp Davis adds that "[s]uch a degree of respect for the nondelegation medievalism is astonishing in the 1970s." He cites the concurring and dissenting opinion of Mr. Justice Marshall, joined by Mr. Justice Brennan, in the same case to the effect that "the nondelegation idea 'was briefly in vogue in the 1930's', and that it 'has been virtually abandoned by the Court for all practical purposes'." Davis concludes: "Why should client's money be spent to argue the nondelegation doctrine to the Supreme Court?" Davis, *Administrative Law of the Seventies, Supplementing Administrative Law Treatise* 29, 30, § 2.01 (1976).

[60] The closest petitioner came in the court below to raising the constitutional issue was an admonitory footnote in its Brief for Appellant (at page 18, note 8) to the effect that "[c]ourts will avoid interpreting a statute in a manner which would render it an unconstitutional delegation."

in the case at all (which they are not), they have been there from the passage of the statute and the promulgation of the regulations. Since these issues were not raised in either court below, they cannot be heard in this Court. *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *United States* v. *Santana*, 427 U.S. 38, 41, n.2 (1976); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n.2 (1970); *Tyrrell* v. *District of Columbia*, 243 U.S. 1 (1917); Stern and Gressman, *Supreme Court Practice* (5th ed. 1978) § 6.27, at 457. This is particularly true when a belated attempt is made to raise constitutional issues. *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

The core of petitioner's argument appears to be that, in its view, the opinion of the court below contains internal inconsistencies which drain its ultimate conclusions of their validity (*see, e.g.*, Pet. i, 11, 14-16, 18, 19 and 22). Even if this were the case (which it is not), petitioner's appropriate remedy would seem to be not review by this Court, but rather a petition for rehearing, perhaps with a suggestion of in banc consideration by the court below. F.R.A.P. Rules 35 and 40, 28 U.S.C.A. Petitioner, having failed to seek either of these remedies, should not be heard in this Court.

2. Barely discernible beneath the constitutional mantle with which petitioner seeks to clothe the issues appear to lurk the same routine questions of statutory interpretation presented to and disposed of by the courts below. Both courts examined these questions in full observance of the usual three-part analysis of statutory language, legislative history, and agency practice urged by petitioner (Pet. 17). The gravamen of petitioner's complaint is that the courts did not reach the conclusions it espoused.

Regarding the ESP offset regulation, petitioner claims that in holding this rule valid the court below ignored the statutory language requiring "differences" in circumstances of sale, ignored an asserted statutory requirement (based on legislative history and administrative interpretation) requiring a direct relationship between expenses adjusted under the circumstances-of-sale provision and the sales in question, and nullified the statutory indirect-expense deductions from the exporter's sales price. The result, according to petitioner, is a reading of the statute which grants limitless discretion to the Secretary.

There is not merit in these claims. Adopting those standards of inquiry into the validity of challenged regulations expressed by this Court in *Zenith Radio Corp.* v. *United States*, 437 U.S.C 443, 451 (1978) (Pet. 12a), the court below held:

> The Secretary has broad discretion in executing the law. While the law does not expressly limit the exercise of that discretion with precise standards or guidelines, some general standards are apparent and these must be followed. The Secretary cannot, under the mantle of discretion, violate these standards or interpret them out of existence. [Pet. 4a]
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> * * *
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> The express language of section 1677b(a)(4) provides that allowances will be made if it is established *to the satisfaction of the Secretary* that the amount of any difference between the United States price and the foreign market value of the merchandise is wholly or partly due to differences in circumstances of sale. The statute does not expressly limit the exercise of the Secretary's authority to determine adjustments, nor does it include precise standards or guidelines to govern the exercise of that authority. Additionally, the statute does not define the term

> "circumstances of sale" nor does it prescribe any method for determining allowances. Congress has deferred to the Secretary's expertise in this matter. [Pet. 13a; emphasis in the original.]

In view of this discretion to make adjustments, the court concluded that the exporter's sales price offset "is a proper and reasonable exercise of the Secretary's authority to administer the statute fairly" and therefore is valid (Pet. 21a). Without it, the administration of the statute would be unfairly skewed in favor of a higher dumping margin because indirect expenses would be deducted in calculating exporter's sales price but would not be deducted in calculating foreign market value, resulting in a comparison of apples with oranges rather than apples with apples, as the court noted (Pet. 19). The court properly concluded that this would frustrate the broader statutory purpose of fairness (Pet. 20). While acknowledging that the offset is not based on directly-related costs or "differences" in circumstances of sale, the court below noted that the expenses being offset are also not direct expenses.[61]

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[61] Petitioner misreads the opinion in stating that the court below found the ESP offset *regulation* " 'somewhat anomalous' because it permits an adjustment for circumstances which by definition are not directly related to particular transactions" (Pet. 18). In fact, the court stated that "the *statutory* deduction of selling expense from exporter's sales price, section 1677a(e), is somewhat anomalous" (Pet. 19a; emphasis added). The court concluded that any inconsistency in the ESP offset reglation thus parallels the inconsistency of "the statutory adjustment that it counteracts" *(id.)*. Similarly misplaced is petitioner's reliance on *F. W. Myers & Co.* v. *United States*, 72 Cust. Ct. 219, 376 F. Supp. 860 (1974), for the proposition that "only directly related" expenses qualify under the "differences in circumstances of sale" provision (Pet. 13, 14). As the CIT noted, that case involved purchase price, not exporter's sales price, transactions; consequently the ESP offset was not involved (Pet. 52a).

Petitioner asserts that the court below recognized "the language and the history of the statute . . . *to be directly contrary to the operation of the Special Rule*" (Pet. 15; emphasis in the original). This is, of course, not the case. To the contrary, in upholding the rule the court said that "the statutory language . . . is the only compelling evidence of record regarding the validity of the offset," and found the legislative history to be "ambiguous on this question (Pet. 20a).

As noted earlier, petitioner has failed to address the question of how the antidumping law could be administered fairly without the ESP offset rule which petitioner seeks to have invalidated. In most cases involving the use of exporter's sales price, dumping margins—and therefore liability for dumping duties—would be created or greatly enlarged solely because of the deduction from exporter's sales price of indirect expenses for selling in the United States required by the statute, absent a balancing deduction for similar actual home-market expenses documented by the foreign manufacturer. It is this result which the Secretary, through the exercise of his congressionally-granted discretion, has sought to avoid and which the courts below have upheld. Without the ESP offset, foreign manufacturers and United States importers, such as Brother Industries, Ltd. and Brother International Corporation, would be subjected to the payment of antidumping duties based not on actual price discrimination between markets, the evil sought to be remedied by the antidumping law, but upon artificial price constructs unfairly loaded against them. The antidumping law would thus be transformed from a remedial to a penalty statute. Nothing in the Act permits, much less compels, such a result.

3. Petitioner's challenge to the ruling of the court below upholding the Cost Rule similarly does not with-

stand analysis. Petitioner contends that the court created an "irrebuttable presumption" not in accord with the "principle of law enunciated by this Court in *Interstate Commerce Commission* v. *J-T Transport Company*," *supra* (Pet. 20, 21). In fact, the court below nowhere used the word "presumption," much less "irrebuttable." Moreover, the narrow holding in the *J-T Transport Company* case—that, as a matter of statutory construction, the provision of the Interstate Commerce Act there at issue did not authorize the ICC to create an irrebuttable presumption, 368 U.S. at 89—hardly qualifies as a universal "principle of law." In any case, having failed to present to the courts below an issue of whether the Cost Rule created an irrebuttable presumption, petitioner cannot be heard to argue that issue here.

What the court below *did* conclude, in the note cited by petitioner, was "that, absent evidence that costs do not reflect value, the Secretary may reasonably conclude that cost and value are directly related," that is, that the use of cost criteria to "satisfy" the Secretary that dumping margins are "due to" differences in circumstances of sale is reasonable (Pet. 16a, n.26). The court relied upon the express statutory criterion that such a connection need only be established "*to the satisfaction of the Secretary*" (Section 773(a)(4), 19 U.S.C. § 1677b(a)(4); emphasis added). Concluding, therefore, that the Secretary did not abuse his discretion in promulgating the Cost Rule, the court suggested that petitioner's remedy lies with Congress, not the courts (Pet. 16a, n.26).

At bottom, petitioner's argument rests on concepts of the rules of evidence applicable in a court of law which simply do not apply to administrative investigations of the type here involved, as is manifest from the exemption of antidumping hearings from the evidentiary strictures

of the Administrative Procedure Act.[62] Antidumping proceedings are not adversarial contests between the domestic industry and importers of foriegn products. Rather, they are investigations designed to elicit information on which the administering agencies may reach the non-adjudicatory determinations called for by the Act.

It is well established that the validity of a rational regulation promulgated under statutory authority will be upheld if it is reasonably related to the purposes of the enabling legislation. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). Despite petitioner's strenuous arguments to the contrary (Pet. 22-25), it is difficult to escape the self-evident, rational conclusion, concurred in by both courts below, that prices are normally related to costs. That the Cost Rule, providing guidance in the quantification of adjustments, is reasonably related to the purposes of the antidumping law is equally self-evident.

The Cost Rule was first officially promulgated in the regulations in 1976, before passage of the 1979 Act with its stringent deadlines for administrative action. If the Commerce Department were now compelled to rely primarily on value-based data, the statute would be almost impossible to administer. As the court of appeals said:

> The ready availability of cost data that can be employed without extensive complex econometric analysis supports the reasonableness of the Secretary's decision to rely on cost. Cost may be the only

[62] Section 774, 19 U.S.C. § 1677c.

> *practical* way to administer the statute. [Pet. 17a, n.27; emphasis in the original.]

To disturb the judgment below would disrupt the "efficient and fair" administration of the antidumping law intended by Congress.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

APPENDIX A

The relevant portions of sections 772 and 773 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. § 1677a and 1677b), are as follows:

SEC. 772. UNITED STATES PRICE [19 U.S.C. § 1677a]

(a) UNITED STATES PRICE.—For purposes of this title, the term 'United States price' means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

(b) PURCHASE PRICE.—For purposes of this section, the term 'purchase price' means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from the manufacturer or producer of the merchandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

(c) EXPORTER'S SALES PRICE.—For purposes of this section, the term 'exporter's sales price' means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e).

(d) ADJUSTMENTS TO PURCHASE PRICE AND EXPORTER'S SALES PRICE.—The purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States,

(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States;

(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and

(D) the amount of any countervailing duty imposed on the merchandise under subtitle A of this title or section 303 of this Act to offset an export subsidy, and

(2) reduced by—

(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 771(6)(C).

(e) ADDITIONAL ADJUSTMENTS TO EXPORTER'S SALES PRICE.—For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

(1) commissions for selling in the United States the particular merchandise under consideration,

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

SEC. 773. FOREIGN MARKET VALUE. [19 U.S.C. § 1677b]

(a) DETERMINATION; FICTITIOUS MARKET; SALES AGENCIES.—For purposes of this title—

(1) IN GENERAL.—The foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States—

(A) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption, or

(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,

increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of importation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this title no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

(2) USE OF CONSTRUCTED VALUE.—If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise, as determined under subsection (e).

(3) INDIRECT SALES AND OFFERS FOR SALE.—If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 771(13), the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

(4) OTHER ADJUSTMENTS.—In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—

(A) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold for home consumption, then for exportation to countries other than the United States);

(B) other differences in circumstances of sale; or

(C) the fact that merchandise described in paragraph (B) or (C) of section 771(16) is used in determining foreign market value,

then due allowance shall be made therefor.

* * * * *

Section 3(b) of the Trade Agreements Act of 1979 (19 U.S.C. § 2504(b)) is as follows:

SEC. 3 RELATIONSHIP OF TRADE AGREEMENTS TO UNITED STATES LAW

* * * * *

(b) IMPLEMENTING REGULATIONS.—Regulations necessary or appropriate to carry out actions proposed in any statement of proposed administrative action submitted to the Congress under section 102 of the Trade Act of 1974 to implement each agreement approved under section 2(a) shall be issued within 1 year after the date of the entry into force of such agreement with respect to the United States.

APPENDIX B

The pertinent regulation issued by the Secretary of Commerce, 19 C.F.R. § 353.15 (1983), is as follows:

§ 353.15 Differences in circumstances of sale.

(a) *In general.* In comparing the United States price with the sales, or other criteria applicable, on which a determination of foreign market value is to be based, reasonable allowances will be made for bona fide differences in the circumstances of the sales compared to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration.

(b) *Examples.* Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs. Reasonable allowances also generally will be made for differences in commissions. Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise by a purchaser.

(c) *Special rule.* Notwithstanding the criteria for adjustments for differences in circumstances of sale set forth in paragraphs (a) and (b) of this section, reasonable allowances for other selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual other selling expenses incurred in the one market, or the total amount of the commission allowed in such other market, whichever is less. In making comparisons using exporter's sales price, reasonable allowance

will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.

(d) *Determination of allowances.* In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise.

APPENDIX C

BRIEF FOR APPELLANT

STATEMENT OF THE ISSUES

1. Whether the International Trade Adminstration's ("ITA") "special rule," 19 C.F.R. § 353.15(c), the "exporter's sales price offset" misinterprets and contravenes the antidumping duty law [now Subtitle B of Title VII of the Tariff Act of 1930, a amended ("the Act").

2. Whether 19 C.F.R.§ 353.15(d), as interpreted by the administering authority, contravenes the statutory criteria for making an adjustment for differences in circumstances of sale under section 773(a)(4) of the Act [19 U.S.C. § 1677b(a)(4)] and contravenes 19 C.F.R.§§ 353.13,353.15(a) of the agency's own regulations.

3. Whether the granting of an adjustment for after-sale rebates, where the rebates were not based solely and directly upon the purchase of portable electric typewriters ["PETs"] and where the amount of the rebate to be received is not known at the time of the sale, was permissible within the meaning of section 773(a)(4) of the Act.

4. Whether the granting of an adjustment for advertising expenses which included multiple product advertising expenses and institutional advertising expenses was in violation of section 773(a)(4) of the Act in that such expenses were not directly related to the sales under consideration and in violation of the administering authority's regulations which permit an adjustment only for an "assumption by a seller of a purchase's advertising or other selling expenses" in reselling the merchandise. 19 C.F.R. § 353.15(b).

5. Whether as a matter of law accessories and printed materials constitute a difference in merchandise within the meaning of sections 771(16) and 773(a)(4)(C) of the Act [19 U.S.C. §§ 1677(16), 1677b(a)(4)(C)] or 19 C.F.R. § 353.16.